

The background of the slide features a large, faint watermark of the Rutgers University seal. The seal is circular and contains the text 'RUTGERS THE STATE UNIVERSITY OF NEW JERSEY' around its perimeter. The central part of the seal is partially obscured by the text.

RUTGERS

New Jersey Agricultural
Experiment Station

Baptists, Bootleggers & Spotted Owls

Tension between Property Rights &
Environmental Resource Regulations

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Explore essential positive role of PPR

- Cleaner safer environment
- Society more tolerant, prosperous & free
- Conserving natural resources
 - PR help send more accurate resource allocation price signals

Explore essential positive role of PPR

- Examples from agriculturist viewpoint & experiences, not legal scholar nor lawyer
 - 1970s Nat Geographic on PPR and farm productivity

Explore Tension Between...

- Common law, Statute/Regulation Law and Environmental quality & resources
 - Ordinary people vs. Special Interests & Government
- Valid govt. regulation of *Fugitive Resources*
- 4 paths to govt. environmental PR regulation
- Examine all issues, from local [down]zoning, and wetlands to Intl trade or healthcare though PPR filter

Explore Tension Between...

- Rebalance role of Common Law in resource conservation
- What is “In the Public Interest?” Restraint using Public Interest Doctrine.
- Sensitize to abuse of environmental Partial Takings under Amendment V, U.S. Constitution

Role Play – PR & Fugitive Resources

- Parable of whaler and baby whale
- Concept of fugitive resource
- Valid role for regulating fugitive resources
- Ownership not perfect, but moves us more toward efficient use and conservation of natural resources
 - Buffalo vs Dairy Cattle. Whales vs Aquaculture

Role Play – PR & Fugitive Resources

- Parable of 20th century dairy farmer and paper mill sharing stretch of Hudson River
 - Absolute settlement by Judges
 - Role of evolved Common Law; Riparian in this case
 - Prior to 1970s, prior to EPA, prior to Clean Water & Clean Air Acts, environmental disputes were conceived as PR problems
 - Problems with market power and monopoly power = biased, distorted, hidden, or coerced resource market prices.

PPR and Resource Protection

- Unclear PR = increased resource degradation & pollution
 - Wildlife poaching, ocean fisheries, firewood
- Tragedy of the Commons
 - Why Garrett Hardin was accurate, yet mistaken on outcomes

PPR and Resource Protection

- *“No one in the history of the world ever washed a rented car.”*
 - Lawrence Summers, Pres. Clinton Treas Secty, Political Economy Prof., World Bank, Pres. Harvard, Pres. Obama Advisor.
- *“Why? Because they didn’t own it. Preserving its value wasn’t important. Farmers who don’t own the land won’t worry about depleting the soil. Companies that don’t own forests won’t worry about sustainable harvesting.”*
 - Is even public housing a PR failure?

Why We Need PPR Law

- Because ***the Law is how society metes out power***
 - NJ wildlife resource mgt problems: deer, Canada geese, Black bear
 - Rails-to-Trails & Historic Preservation disputes in communities
 - Navigable Waters Case, Cranberries in MA
 - Noxious weeds like Canada Thistle. NJ 1910 Reg
 - Dairy barn nuisance flies

Why We Need PPR Law

- Because ***the Law is how society metes out power***
 - Go to NJ Legislature website & search ***Property***
 - How many results?
 - Greenhouses (ind farming viewscape) on preserved land
 - Economic Development Eminent Domain - Kelo Case CT
 - Pending NJ Acts:
 - Adverse Possession Act to Clarify PR
 - Compensation for Partial Takings

Outcomes of PPR Law

- Economic efficiency using & allocating scarce resources to best satisfy human needs
- Conserving natural resources
 - Faster response to–undistorted unbiased–prices than to policies and regulation

Outcomes of PPR Law

- Care for ourselves safely
 - Where PR are not protected, people cannot safely care for themselves
- Protect human freedoms
 - Where PR are not protected, Freedoms and the Environment suffer
- Encourage cooperative social behavior
 - Behave as if we care for and value others, or at least tolerate [their rights and freedoms] even if we don't

Outcomes of PPR Law

- Because ideas have consequences
 - Founders (T. Jefferson) saw economic PPR as summary distillation of ***all*** our rights (based on history of civilizations)
 - PPR the best defense against political nonsense
 - PPR and a Free Press, “Restrain the follies of government and discipline its mischief”
 - Careful censorship of government
 - Limit size = Limit power = Limit mayhem and corruption
 - People have reached wrong conclusion last 35 years

Defining PR – The 3 Ds

- Property must be:
 - 1. **Defined**; for exclusive use
 - 2. **Defended**; for exclusive possession, by policing when needed. Primarily against thieves and government
 - 3. **Divestible**; Ability to dispose, transfer, buy or sell, without market bias, coercion, or externalities

Defining PR. The 3 D's

- PPR are among the most significant institutional relationships of society, like marriage, family, employer/employee, or government/citizen
- Institutions in social sense, not organizations; sanctioned patterns of behavior, force of custom

2 ways managing world's property

- Ordinary people work hard, develop resources, produce things others value, and trade with other value-producing people to accumulate wealth
- < or >
- Ordinary people assemble enough power and take what others have produced
 - Princes, kings, and their armies have battles over who gets what from government, rather than who works for wealth

2 ways managing world's property

- Knowing this, ordinary people invented govt. for protecting property, safety & accumulated wealth
- **Tension: any** govt. powerful enough to protect is powerful enough to take property
 - Regulatory **Partial** Environmental Takings, under guise of Public Trust
 - U.S. Courts “partial,” up to 90+% not Amendment V Taking. Takers usually win. Deeply frustrating to ordinary people in daily lives
 - Beachfront construction vs. Environ Comm., Lucas Case SC
 - NJ Pine Barrens PDCs valuation

2 ways managing world's property

- If gains from stealing exceed the gains from working, stealing expands
 - Easiest path is to become member of “protected class”
 - Smaller the group taking = bigger benefit; Downzoning
 - When the cost of something desirable goes to zero, demand becomes insatiable; e.g., wetlands
- There will always be a tension between protecting PR, abuse and coercion, and Government or special interest hunger for acquiring PR

Where are people more healthy, free, and prosperous?

- Question our PR Notions
 - Nations rich in natural resources?
 - Or nations rich in Property Rights?
 - Venezuela or Hong Kong
 - Haiti or Dominican Republic
- “What the Third World’s poor need most is a recorder of deeds.”
 - In “The Other Path: The Invisible Revolution in the Third World.” Hernando deSoto, Peruvian Economist and author

Where are people more healthy, free, and prosperous?

- Question your PR notions
 - Who better...
 - Protects the environment?
 - Practices conservation?
 - Efficiently allocates scarce natural resources?
 - Nations rich in public ownership of resources?
 - Or Nations rich in PPR and incentives?
 - Russia (former Soviet Socialist Republics) or U.S?
 - Sudan or Israel?

Where are people more healthy, free, and prosperous?

- Who better tolerates and respects people different from themselves?
 - Communities in nations high in PPR?
 - Or Communities with forced regulation of PR relationships?
 - New South Africa or Zimbabwe next door?
 - India or Iran?

Where are people more healthy, free, and prosperous?

- Who behaves “as if” they value concerns of others, tolerating others’ individual freedoms?
 - Nations rich in public economy ownership or nations rich in private economy ownership?
 - Former East Germany or former West Germany?
 - Former Apartheid So. Africa or Sweden/Norway?
 - U.S. urban poor living among high public property ownership or rural poor living among high private ownership?
 - Camden, NJ or Scranton, PA?

Summarize: Why Property Rights?

- Tolerance of others different from ourselves. Not embrace, but tolerate enough to cooperate and not coerce, abuse, steal.
- Efficient use and conservation of natural resources
- Protect Freedom
- Behavior, moral or genetic basis for PR

A Moral or Genetic Basis for PRs?

- Bible (Old Testament)
 - “Only where you sow may you reap”
 - Goring by neighbor’s ox and other common PR disputes
- Youth; sign on teens’ bedroom doors
 - “Melissa’s Room – Keep Out”
- Poetry: “Good fences make good neighbors”
 - Robert Frost, 1914
- Farmers
 - Deeply sense moral value of relationship with their land PR, even when they can’t explain it
- Native Americans
 - Different notions; unsuccessful against onslaught abuse violations of their PR. A dark stain on US PR Law

Summarize: Why Property Rights?

- Tolerance of others different from us
 - Sand mine and minority truck driver.
 - PR provide incentive for people to socially cooperate and respect “as if” they were as concerned with well-being of others as they are of their own.
- Establish unbiased uncoerced fair value for transfer, preventing ripoff and theft transactions. No power asymmetry.
 - Land or Trees are no different than iPods or NYSE Stocks

Summarize: Why Property Rights?

- Environmental issues civil public discourse—tolerance—declines, more vicious, as...
 - Size and scope of government ownership of PR enlarges
 - Power over PR gets pulled more toward government center (more to fight over)
 - with increasing public ownership and declining property rights

Summarize: Why Property Rights?

- “Because elections are a futures market in theft.”
– H.L. Mencken

Break and Discussion!

Non-Renewable vs. Renewable Res & PPR

- Which deplete first? Non-renewable finite or renewable resources.
 - What's the real world experience of oil, coal, gas, minerals, water, Nitrogen fertilizer, and sand... versus
 - Endangered species, some game species, forests, ocean fisheries?
- More non-renewable resources are privately owned and more renewable resources are publically owned
- Conservation of resources depends on efficient use
- PPR and undistorted response to price signals are main reasons we do not run out of resources

Fugitive Resources

- Frequent association with degradation, depletion, and pollution
 - Pollution, or resource degradation, commonly occurs when “environmental receptors” of pollution (air, water, etc.) are commonly owned, where rights are unclear, not held as private property.
- Likely one of valid limited roles for government environmental regulations.

Fugitive Resources

- Most frequent cause of community resource & Right-to-Farm conflicts.
 - Air
 - Chemical trespass or Pesticide Drift. Pollution discharge enters your lungs; violates your rights (enjoyment of use).
 - Restrictions on owners to protect health and safety do not violate their PR, because they never had that right.
 - Water
 - Discharge on my property moves downward, spreads underground, lands on you. You can't protect yourself.
 - Nuisance:
 - Noise from irrigation pumps
 - Odors, Flies, Dust

Fugitive Resources

- These ***Economic Externalities*** occur when either producers or consumers do not consider all costs or benefits of their actions when making decisions
- Pollution or resource degradation interferes with the rights of other individuals and enterprises in the enjoyment of those goods

Fugitive Resources

- Most frequent cause of community resource & Right-to-Farm conflicts.
 - Scenic View PR (NJ Highlands to Yellowstone WY)
 - Problem wildlife; deer, black bear, Canada geese, etc.

Fugitive Resources

- Some good things can only be done by government violating PPR
- However, whenever PPR are violated to do good, eventually there is a price in disincentives for meeting human needs, in reduced Freedoms and Liberty
- This is experience of human Political Economy history, not my opinion.

Proper Role for PR Env. Regulations?

- Fugitive resources, especially in preventing nuisance pollution.
- Externalities demanding planning or zoning.
 - Public recreation access to PP, Rails-to-Trails
- Not everything obeys Robert Frost's "Good fences make good neighbors."
 - "But there's nothing like a lawsuit to iron out a dispute with the folks next door." Famous humor postscript on Frost
 - Love your neighbor, yet not pull down your hedge.
 - English proverb

Environmental PR Regulations

- Four theories explain our experiences with government regulation of environment, natural resources, and PR:
 - **Public Interest Theory**
 - **Capture Theory**
 - **Economic or Special Interest Theory**
 - **Baptists and Bootleggers Theory**
 - Thanks to Bruce Yandle

Environmental PR Regulations

- **Public Interest Theory**

- Politicians seek to solve private sector problems that cannot be addressed otherwise.
- *Externalities: Zoning, Schools, Immunization, Dams, Roads, Interstate Commerce, War*
- Is there a compelling public interest? Growth in transfer payments to individuals rather than to public goods.
- 44,000 federal lobbyists, 400 per Senator
- What if there is no such thing as “in the public good” or “in the public interest,” just lots of competing private interests?

Environmental PR Regulations

- **Capture Theory**

- In attempting to serve the Public Interest, regulators and politicians unwittingly become captured by the regulated sector.
- *Transportation construction? Fish & Wildlife Mgt. Code? Dairy Industry? Banking and Insurance? Tiered system of liquor distribution by states?*
- One indicator is serious alternatives rarely proposed.
- Licensing of trades reduces competition for remaining members.

Environmental PR Regulations

- **Economic or Special Interest Theory**

- Politicians are just brokers. They “sell” government imposed restrictions to the highest bidders (re-election donations or votes)
 - *Grazing rights on Western federal lands vs. recreational outdoors users*
 - *Under guise of public safety protection against snake oil, FDA restrictions on non-patent, natural, or homeopathic remedies stifle access to non-patent botanical products*
- The smaller the group backing the regulation, the higher the per capita economic return to them.

Environmental PR Regulations

- **Baptists and Bootleggers Theory**
 - “Successful regulatory efforts have a moral foundation. Those seeking to serve a noble purpose share objectives with other organized groups who simply seek to serve their own interests.” - Bruce Yandle

Environmental PR Regulations

- **Baptists and Bootleggers Theory**

- Spotted owls and Weyerhaeuser on Western public lands vs. private lands.
- Lost opportunity costs to logging industry for saving 5,000 spotted owls on public land was \$9 million per owl, \$45 billion.
- NJ courts, direct wine shipments, 3-tier system
- Ask who's the Baptist and who's the Bootlegger? Follow the path of who benefits. Not only what is said; examine behavior, the flow of rights and money.

Why PR Environmental Regulation?

- Until current 1970s era, conservation, environmental pollution, and resource degradation problems were addressed and settled as property rights disputes, which they are.

Why PR Environmental Regulation?

- However, government was clever and powerful.
 - The “Public Trust Doctrine” is a notion there is a Public Interest stake in regulating Private Rights.
 - In 1970s, began greatly expanded use in U.S. environmental regulation to articulate that “I,” i.e., *any public member*, has a stake in what you do with property.
 - Government began substituting regulatory restrictions for paying real value, and for obeying its own Laws = Partial Takings.
 - Includes wildlife, farming practices, recreational access on western rivers in grazing land, community neighborhoods, etc.

Which way out on Partial Takings?

- In our time, Partial Takings may be underlying cause of [un]civil conflict and possible path to violence and rebellion.
 - Endangered Species Act = Land use restriction, NOT species protection. AKA, "Shoot, shovel, and shut up."
 - Wetlands Protection and Clean Water Acts (= above)
 - Recreational access mandates
 - Local Downzoning, Pinelands and Highlands = equity theft
 - Environmental Zoning Restriction. Lucas SC beachfront
 - Viewscape restriction
 - Economic Development Eminent Domain. Kelo CT

Amendment V Litigation Incentive

- When government cost for taking PR in guise of environmental public interest nears \$0, demand becomes insatiable.
 - NJ Highlands get “designated;” Cost to public for taking that value is near \$0. Demand for env. zoning (like theft) rises
 - If a parcel on your property is mapped as wetland, and use is restricted, cost of public taking drops to \$0. EPA, DEP, and Private groups will increase mapping efforts to acquire more. Ditto if endangered species are found
 - When you hear certain PR phrases, hold your wallet

Which way out on Partial Takings?

- Amendment V, U.S. Constitution, 1787. “No person [shall be] deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.”
 - Can a return to greater use of Common Law, Law of the land, offer hope? Pre 1973, Courts more strict, more absolute. Env. problems settled as property rights disputes
 - Returns more control to communities, using Courts. Protects against market power manipulation. Secure PPR can help solve some environmental problems

Which way out? Take away concepts

- Tune your ear and heart to PPR assaults
- Skeptical PPR filter. Look for Baptists and Bootleggers in environmental resources and gov't regulation
- There may be no such thing as regulation "in the public interest." Overused. Restrain expanded use of Public Interest Doctrine
- Lean legal pendulum a little toward respecting Common Law; trusting ordinary citizens in local communities and judges to address environmental problems

PPR is a heady topic

- Beware of experts' agendas
- Beware scholars of environmental doom and gloom
 - Neo-Malthusians
 - Lester Brown, *Worldwatch*. David Pimentel, Cornell. Karl Marx. Paul Ehrlich, Stanford. Barry Commoner, Ralph Nader. Bruce Babbitt
 - Most university talking head environmentalists
- Vs scholars considering role of PR tempered with justice in a prosperous free society
 - Dwight Lee, Univ. of GA. Richard Epstein, Univ. Chicago. Hernando deSoto. Bruce Yandle. Thomas deGregori at Univ. Houston. Adman Smith.